

No. 94582-9

NO. 476671-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of:

GARY MEREDITH,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEFING

1. During jury selection, the court may not deny an accused person his right to exercise the peremptory challenges to which he is entitled under law. The court denied Mr. Meredith's right to exercise the full number of peremptory challenges for alternate jurors to which he was entitled by giving him fewer potential challenges than required. Did the court impermissibly deny Mr. Meredith his right to exercise peremptory challenges?

2. Where defense counsel was unaware of the requirement of CrR 6.5 that entitled the defense to two peremptory challenges, failed to conduct an adequate pretrial investigation of the State's witnesses, including the treating physician who examined the complaining witness, B.L., and failed to retain a medical expert to challenge the State's assertion that non-motile spermatozoa had to be the result of sexual intercourse that occurred within the past three days, was Mr. Meredith denied effective assistance of counsel?

3. Did the trial court commit reversible error by failing to give the jury a legally incorrect limiting instruction for ER 404(b) evidence?

4. A motion to sever should be granted where necessary to ensure a

defendant a fair trial. Mr. Meredith moved to sever a charge of communicating with a minor for immoral purposes from rape of a child in the second degree. Did the court err in denying Mr. Meredith's motion to sever?

5. Where defense counsel failed to investigate the issue of the duration of motility of spermatozoa where non-motile spermatozoa were found in a swab from the alleged victim and where the State alleged that the sample was obtained within two hours of the alleged offense, and where the absence of motile spermatozoa supports Mr. Meredith's denial of having had intercourse with B.L., is the petitioner entitled to an evidentiary hearing to determine through expert testimony the typical duration of motility in sperm?

6. Where defense counsel failed to investigate the issue of the frequency in which trace evidence such as semen and vaginal fluid is present in cases involving rape, and where a "blue light" examination of B.L. by a nurse was negative for trace evidence, is the petitioner entitled to an evidentiary hearing to determine the frequency in which trace evidence is typically found in cases involving an allegation of sexual assault?

B. STATEMENT OF THE CASE

1. Procedural history:

Gary Meredith was convicted of second degree rape of a child and communication with a minor for immoral purposes in Pierce County Cause No. 95-1-04949-6. In the appeal, Mr. Meredith argued that exclusion of a juror was the result of a *Batson*¹ violation, (2) insufficient evidence supported his conviction for communication with a minor for immoral purposes, and (3) the trial court improperly prohibited him from arguing about the absence of DNA evidence during closing argument. On August 9, 2011, this Court issued a published in part decision affirming Mr. Meredith's convictions in both counts. See, *State v. Meredith*, 165 Wn.App. 704 259 P.3D 324 (2011). Review was granted regarding the *Batson* challenge, and on August 8, 2013, the Supreme Court affirmed the trial court, holding that a dissent in *State v. Rhone*² does not establish a new bright line rule regarding the first step of the *Batson* test. *State v. Meredith*, 178 Wn.2d 180, 306 P. 3d 942 (2013).

Mr. Meredith timely filed a Personal Restraint Petition (PRP) on August 4, 2014, asserting, *inter alia*, that his restraint is unlawful because he was denied of the required number of peremptory challenges, that he

¹ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

² *State v Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010)

received ineffective assistance of counsel, that the trial court erred by denying the defense motion to sever counts I and II, and the trial court erred by miscalculating his offender score. (See Meredith's PRP, Brief in Support of PRP, Reply Brief of Petitioner, and Supplemental Reply Brief). By order dated April 27, 2016, this Court found that "the issues raised by [Meredith's] petition are not frivolous." The Court referred the petition to a panel of judges and ordered counsel to be appointed at public expense.

C. ARGUMENT

1. THE COURT IMPERMISSIBLY DENIED MR. MEREDITH THE PEREMPTORY CHALLENGES TO WHICH HE WAS ENTITLED

a. The court may not interfere with or otherwise deny peremptory challenges mandated by CrR 6.5

In criminal cases, the accused has the right to assist in selecting a jury by fair and impartial means. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Irby*, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Wash. Const. art. I, section 22. Article I, section 22 contains stronger protections guaranteeing the right to trial by jury than the federal constitution. *Irby*, 170 at 884 (right to "appear and defend" mandates defendant's personal participation in all stages of jury

selection); see *State v. Williams-Walker*, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010).

The peremptory challenge is a "means of assuring the selection of a qualified and unbiased jury." *Batson*, 476 U.S. at 91. CrR 6.5 provides the court with discretion whether to select alternate jurors. The court may select 12 jurors with the hope that each juror is able to serve for the duration the trial, but when the trial court selects alternate jurors, CrR 6.5 is invoked. Without alternate jurors, the minimum number the court may allocate in most felony trials is six peremptory challenges for each the prosecution and defense. CrR 6.4(e)(2). When alternates are included on the jury panel, the parties are entitled to the additional peremptory challenges allowed for each alternate. CrR 6.5 provides in relevant part:

When the jury is selected the court may direct the selection of one or more additional jurors, in its discretion, to be known as alternate jurors. **Each party shall be entitled to one peremptory challenge for each alternate juror to be selected.** When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the challenge provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant. If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the jurors place on the

jury.

(Emphasis added).

By mandating that "each party shall be entitled" to specified additional peremptory challenges when the court seats alternate jurors, the court rule is construed as "presumptively imperative and operates to create a duty." See *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

In the case at bar, the court selected two alternate jurors, and therefore should have allotted a total eight peremptory challenges. The court's decision to have two alternate jurors invoked CrR 6.5, therefore required a total of eight peremptory challenges for each side. The trial court inexplicably allocated only seven per side, contrary to the plain language of CrR 6.5. (See, Affidavit of Brett Purtzer, at 1, Reply Brief of Petitioner, Appendix A.) In his Affidavit, trial counsel affirms that the defense exercised seven peremptory challenges, and that if the court had afforded further challenges, counsel would have excused either Juror No. 11, 14, or 16. Affidavit of Brett Purzer at 2. Of particular note is Juror 16, whom Mr. Purtzer states was undesirable or excusable because of the juror's strict attitude toward prohibiting alcohol in the juror's home. Alcohol played a role in the state's case against Mr. Meredith. Trial counsel stated in his declaration that by excusing one of the

above-numbered jurors, there was a high probability of a different outcome for the trial. Affidavit of Purtzer at 2. However, it is not necessary to show that the outcome of the trial would have been different. The *Vreen* Court noted that unless jury deliberations were recorded, it would be impossible to know whether the error affected the outcome to the trial *State v. Vreen*, 143 Wn.2d at 931. Therefore the court, affirming *Evans*, held that “[a]ny impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice.” *Vreen*, 143 Wn.2d at 931 (quoting *Evans*, 100 Wn. App. 774).

In this case, Mr. Meredith did not decline to exercise any peremptory challenge. At the conclusion of jury selection the court announced that the attorneys would exercise their exceptions, and the state and defense exercised seven peremptory strikes each. RP (5/2/96) at 240. The court announced that Jurors No. 1, 8, 11, 13, 14, 15, 16, 17, 20, 23, 24, 32, 35, and 39 the court would be empaneled without affording Mr. Meredith the opportunity to exercise any additional peremptory challenges. RP (5/2/96) at 240, 241.

During the course of the trial, Juror 12 (Juror 24 during jury selection), was excused due to illness. RP at 491. At the close of the case, the court randomly selected Juror 7 as the alternate and was excused before

deliberations, RP at 603.

b. The failure by the court to provide Mr. Meredith with the full number of peremptory challenges is a structural error when he was not permitted to participate in the selection of jurors who deliberated in the case.

The trial court allowed only a single peremptory challenge despite selecting two alternate jurors. Under CrR 6.5, the defense was "entitled" to at least one peremptory challenge for each alternate selected. A court abuses its discretion when it misunderstands and misapplies mandatory requirements of a court rule. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The court misunderstood the requirements of CrR 6.5 when it denied Mr. Meredith a peremptory challenge for a seated alternate juror.

As noted above, "Any impairment of a party's right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply." *State v. Evans*, 100 Wn.App. 757, 774, 998 P.2d 373 (2000). The Supreme Court explicitly adopted the reasoning of *Evans* in *State v. Vreen*, 143 Wn.2d 923, 931- 32, 26 P.3d 236 (2001). In *Vreen*, the court held that if jurors deliberate and render a verdict after the court has improperly denied the defendant opportunity to

exercise a peremptory strike to which he was entitled, the error is structural and reversal is required. *Id.* at 932.

In addition, Mr. Meredith did not waive his right for an additional peremptory strike under CrR 6.5 by failing to object on the record. The peremptory strikes were conducted during side bar and were not made part of the record. He used the seven peremptory strikes that he was allowed. Waiver “ordinarily applies to all rights or privileges to which a person is legally entitled” and also is “the intentional and voluntary relinquishment of a know right[.]” *Dombrosky v. Farmers Ins. Co.*, 84 Wn.App. 245, 255, 928 P.2d 1127 (1996).

Here, however, the facts do not show that Mr. Meredith knew of or had any intent whatsoever to waive his right to additional peremptory challenges. Nothing in the record indicated that Mr. Meredith knew or initially relinquished his right to an eighth challenge. Mr. Meredith therefore did not waive his right under Cr 6.5.

The holdings and logic of *Evans* and *Vreen* control in Mr. Meredith's case. The court denied Mr. Meredith his right to exercise peremptory challenges to which he was "entitled" under CrR 6.5. The premise of a peremptory challenge is that the accused need not identify a specific basis on

which to challenge a particular juror, and therefore, the accused person is not required to show that a particular juror sat on the case that should have been excused. *Vreen*, 143 Wn.2d at 931. Instead, denying the accused the right to exercise a peremptory challenge to which he was entitled is a fundamental error undermining the integrity of the trial process. *Vreen*, 143 Wn.2d at 931.

As shown by Mr. Purtzer's affidavit, a juror was seated on the panel for whom Mr. Meredith was not only entitled to challenge, but would have challenged if allocated the appropriate number of peremptory. The court's failure to follow the clear directive of CrR 6.5 and to deny Mr. Meredith the right to exercise peremptory challenges to which he was entitled requires a new trial. *Vreen*, 143 Wn.2d at 932; *Evans*, 100 Wn.App. at 774.

2. MR. MEREDITH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

The State and Federal constitutions guarantee a defendant reasonably effective representation by counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987); U.S. Const. amend. 6; Const. art. 1, § 22. Ineffective assistance is established when a defendant shows that counsel's performance was deficient and that the deficient performance prejudiced the

defense. *Strickland*, 466 U.S. at 687. *Thomas*, 109 Wn.2d at 225-226. The first prong of the *Strickland* test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound trial strategy for counsel's actions. *Strickland*, 466 U.S. at 689. The second prong of *Strickland* requires the defendant to show only a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226.

The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Mr. Meredith was convicted of second degree rape of a child and communication with a minor for immoral purposes. The alleged victim in the case was B.L., who was 12 at the time of the alleged offense. RP at 244. Shortly after the alleged offense, her parents took her to the hospital where she was examined

by staff RN Michelle Russell and also by Dr. Bobbi Ann Sipes. RP at 426, 491.

Defense counsel was ineffective by failing to perform an adequate pretrial investigation in order to retain a consulting or testifying medical expert to rebut the testimony of Dr. Sipes. Swabs taken from the back of B.L.'s vagina were collected and tested positive for the presence of non-motile spermatozoa. RP at 503. Dr. Sipes testified that she believed that "semen is recovered from the vaginal vault up to three days following intercourse." RP at 503. She stated that the sperm recovered from the vaginal vault could have deposited "any period of time, three days before. . ." RP at 503. She was unable to tell by reasonable medical certainty when the intercourse occurred. RP at 503. A DNA profile was not made using the swabs. RP at 37.

Mr. Meredith's ineffective assistance of counsel claim hinges on the failure of trial counsel to consult with an expert or experts to develop the significance of the presence of non-motile sperm and relevance to the timeline asserted by the state. B.L. stated that she left the apartment where the offense allegedly took place at about 10 or 10:30 p.m. RP at 321. Dr. Sipes testified that B.L. was admitted shortly after midnight and that she examined B.L. between 12:30 a.m. and 1:00 a.m., approximately two hours after the alleged offense. RP at 497, 506.

The testimony of the treating physician was of critical importance. The state introduced evidence that the complaining witness B.L. was evaluated and a swab was taken approximately two hours after the alleged offense. Dr. Sipes testified that the sperm obtained in the swab were “non-motile.” This testimony was a key element that was entirely unchallenged by the defense. The significance of the non-motility of the sperm obtained was not investigated by the defense. Mr. Meredith just had a single witness, and that witness was a friend; not a medical expert.

“In sexual assault cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel.” *Gersten v. Senkowski*, 426 F.3d 588, 607 (2d Cir.2005) (citing *Eze v. Senkowski*, 321 F.3d 110, 127–28 (2d Cir.2003); *Pavel v. Hollins*, 261 F.3d 210, 224 (2d Cir.2001); *Lindstadt v. Keane*, 239 F.3d 191, 201 (2d Cir.2001)). This is particularly relevant in Mr. Meredith’s case, where the state’s case rests on the credibility of the alleged victim and third parties, rather than DNA evidence.

Counsel was ineffective by failing to adequately prepare for cross examination of Dr. Sipes and by failing to obtain an expert to consult or testify

regarding the testimony regarding the sperm motility found in the swab taken by Dr. Sipes.

The decision whether to call a certain witness is a matter of trial tactics and does not support a claim of ineffective assistance of counsel. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). However, “depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant. *State v. A.N.J.*, 168 Wn. 2d 91, 112, 225 P.3d 956 (2010). The presumption that counsel was competent can be overcome, however, by a showing that counsel failed to conduct appropriate investigations to develop a defense, adequately prepare for trial, or subpoena necessary witnesses. *State v. Maurice*, 79 Wn. App. 544, 903 P.2d 514 (1995); *State v. Jury*, 19 Wn. App. 256, 263-64, 576 P.2d 1302, review denied 90 Wn.2d 1006 (1978).

Had counsel investigated the case, he would have learned of Dr. Sipes’ anticipated testimony regarding the non-motile sperm. Instead, the testimony about the non-motile sperm came in during direct examination by the prosecution.

Remarkably, defense counsel’s cross-examination of Dr. Sipes, which took only three and a half pages in the transcript, does not attempt to challenge Dr. Sipes

regarding sperm longevity, on inquire regarding the length of time non-motile sperm may remain in the body. Defense counsel's cross examination makes no attempt to challenge the state's assertion that non-motile sperm was the result of sexual activity within the last few hours, rather than the result of much earlier activity.

Had counsel adequately investigated the matter he could have presented testimony from a medical expert to determine the duration of motility in sperm in order to refute the state's timeline and Dr. Sipe's testimony that non-motile sperm would not be expected to be seen after three days.

Failure to conduct an adequate investigation, constituted deficient performance. See *State v. Visitacion*, 55 Wn. App. 166, 174, 776 P.2d 986 (1989)(Where counsel made no effort to contact or interview individuals named in police reports, rejection of them as witnesses fell below prevailing professional norms). Here, counsel's cross examination of Dr. Sipes essentially conceded that non-motile spermatozoa would normally be expected to be seen up to three days after sexual intercourse, and by implication, intercourse had occurred recently. Counsel made no effort to cross examine Dr. Sipes on this point. RP at 502-06. Counsel's error prejudiced the defense.

This case came down to a credibility contest. The jury could not believe B.L. , and thus convict, if they believed Mr. Meredith's defense because of counsel's failure to aspiration Dr. Sipes testimony in advance, the state crucial evidence was virtually unchallenged by a medical expert. It is reasonably likely that the defendant's unsubstantiated claims of innocence when the state provided testimony that the crime had to have occurred during the time that B.L. was with Mr. Meredith earlier that night,³ undermined the credibility of the argument proffered by defense counsel to such an extent that the jury rejected his defense. Had he done a reasonable job, counsel would have discovered that Dr. Sipe's testimony regarding non motile sperm was subject to considerable criticism that could have been explored at trial through an expert. Counsel's failure to investigate the condition and present medical testimony denied Mr. Meredith his right to effective counsel.

An investigation would show that Dr. Sipes' "three day" statement was highly questionable. Medical and forensic literature shows a wide variety of factors involved in determining the length of time that spermatozoa may be present in the human body. For example:

³ During closing argument the State argued that from Dr. Sipes' testimony that spermatozoa an only be in the vaginal canal for three days before it's expelled, the only

In living individuals, motile sperm are usually seen only up to 6 h, occasionally 12 h, and, very rarely, up to 24 h. In the latter case, it is probable that the sperm was obtained from the cervical mucus. Thus, it is important when searching for motile sperm in an individual alleged to have been raped only a few hours before to obtain this material from the vaginal pool and not from the cervix.

Forensic Pathology, Second Edition, Dominick DiMaio, Vincent J.M. DiMaio, M.D. at 442.

Similarly, the persistence of spermatozoa can vary significantly.

“The survival time of spermatozoa in the vagina of living individuals as reported in the medical literature is quite variable. This can be explained by two factors: where the sample was collected and what criteria are used to identify sperm. Some clinicians identify sperm only when they see a complete spermatozoa—one with a head and tail. Other individuals require only a head to be present.”

Forensic Pathology, Second Edition, Dominick DiMaio, Vincent J.M. DiMaio, M.D. at 443.

In addition, even a cursory review of fertility clinics shows a large number of clinics in the Thurston, Pierce and King County area which should have proven a rich ground in which to secure an expert to testify regarding the state of the medical knowledge regarding the duration of sperm motility after intercourse.⁴

options to explain “how that sperm got there[.]” and that was there “was sexual intercourse that night.” RP at 566.

⁴ An internet search shows the following clinics or physicians specializing reproductive medicine: Gyft Clinic, Seattle Reproductive Medicine – Tacoma, Seattle Reproductive Medicine – Kirkland, Dr. Robert Mclees, Overlake Reproductive Health,

Defense counsel could have likely retained a qualified medical expert who could testify that the state's physical evidence was not an indication of recent sexual activity, and that if there had been sexual intercourse during the time frame asserted by B.L., the swab would have been expected to contain live, motile sperm. This would have cast doubt on Dr. Sipes' testimony regarding the window of time in which intercourse could have taken place, and supported Mr. Meredith's assertion that the witness was fabricating the allegation.

In addition, as in *Gersten*, Mr. Meredith's counsel was ineffective by failing to conduct a reasonable pretrial investigation. The "presumption of counsel's competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations" *State v. Thomas*. 109 Wn.2d 222, 230, 743 P.2d 816 (1987). Counsel's defense strategy was not based on a thorough investigation of the law or facts or supported by reasonable professional judgment investigations. Counsel appeared utterly unprepared for Dr. Sipes' testimony regarding sperm motility, and in fact did not pay attention to the testimony until closing argument.

Counsel did not conduct investigations of Michelle Russell, RN, pertaining

to the “blue light” examination of B.L. and her clothing, and Detective Randy Goetz, regarding the lack of DNA testing. (See Brief of Petitioner in Support of PRP, at 2-6). A defendant raising a “failure to investigate” claim must show a reasonable likelihood that the individual would have produced useful information not already known to counsel. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). Here, even a cursory interview with Dr. Sipes would have revealed the issue of the sperm motility and the implication on the state’s assertion that she had sexual activity within the two hours before she was examined because trial counsel thought that he could rest the defense solely on the theory that B.L. fabricated the allegation against Mr. Meredith because she was caught disobeying her parents by breaking curfew and consuming alcohol. RP at 577-588. Defense counsel failed to conduct a reasonable pre-trial investigation into the facts.

Moreover, Mr. Meredith was prejudiced by this lack of legal and factual investigation. In evaluating prejudice, ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government’s case. *Davis*, 152 Wn.2d at 739. Here, the State’s case is not strong. The case rested almost entirely on the case on the testimony of B.L., M.J., and C.T., whose credibility was

Medical Center, and Dr. James Kustin.

at issue. The record shows instances where the witnesses acknowledged being deceptive or untruthful. See, e.g., RP at 162, 166-67, 212-13, 261, 294, and 302.

Mr. Meredith was also prejudiced by his counsel's failure to challenge the trial court's denial of an eighth preemptory challenge, discussed supra. Even rudimentary research would have revealed that CrR 6.5 mandated that the defense receive a total of eight preemptory challenges. Counsel's "lack of preparation and research cannot be considered the result of deliberate, informed trial strategy." *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir.1987). Trial counsel's performance was not based on a thorough investigation of the law, and this constituted deficient conduct.

3. THE TRIAL COURT ERRED IN DENYING MR. MEREDITH'S MOTION TO SEVER THE TWO COUNTS.

Mr. Meredith moved in limine to sever the two charges in this case. RP at 63-67, 85. After the court denied the motion, Mr. Meredith renewed it on subsequent occasions. RP at 517. The rules governing severance are based on the fundamental concern that an accused person receives "a fair trial untainted by undue prejudice." *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998); U.S. Const. amends. V, XIV; Const. Art. I, §§ 3, 22; CrR 4.4(b).

Although a severance determination is reviewed under an abuse of discretion standard, a trial court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). A court abuses its discretion by using the wrong legal standard or by failing to exercise discretion. *Id.* "Indeed, a court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." *State v. Fisons*, 122 Wn.2d at 339 (quoting *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)).

An exercise of the trial court's discretion over whether severance is appropriate rests on an evaluation of whether severance promotes a fair determination of guilt or innocence. *In re Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004); CrR 4.4(b). In this case, the court refused to sever the charge of second

degree rape of a child from communicating with a minor for an immoral purpose. In this case, the court's refusal to sever the charges denied Mr. Meredith a fair trial. Four criteria guide a court in the assessment of whether to sever counts. (1) the relative strength of the evidence on each count; (2) the clarity of defenses; (3) court instructions to the jury to consider each count separately; and (4) the cross-admissibility of evidence of the remaining charges in separate trials. *State v. Sutherby*, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009).

Here the State charged Mr. Meredith with a felony count of communication with a minor for immoral purposes. In order to elevate the charge to a felony, the State successfully moved for admission of Mr. Meredith's prior convictions for third degree rape and third degree assault with sexual motivation. The two offenses, however, were particularly prejudicial to Count 1, and there is a "recognized danger" that that prejudice will persist even where the jury is instructed to consider counts separately. *Sutherby*, 165 Wn.2d at 883- 84 (citing *Saltarelli*, 98 Wn.2d at 363; *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984)).

Beyond this inherent prejudice, the communication count served as the vehicle by which the State introduced the prior convictions into evidence. The error

was compounded because the court, although finding the convictions admissible pursuant to ER 404(b), did not instruct the jury as to the purpose for which the convictions were admitted, See, Section 4, below.

4. **THE TRIAL COURT ERRED BY FAILING TO GIVE THE JURY A LEGALLY CORRECT LIMITING INSTRUCTION FOR ER 404(B) EVIDENCE.**

After denying the defense motion to sever Count 1 and Count 2, the ground affirmed its prior decision to admit Mr. Meredith's prior convictions of third degree rape and third degree assault with sexual motivation. RP at 70, 95-96. The court ruled that the convictions were admissible under ER 404(b) to prove absence of mistake or identity, preparation, and motive. RP at 29-30, 95. The jury instruction stated:

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding Count II and for no other purpose.

Instruction 14.

In *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012), the Supreme

Court held:

An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has

acted in conformity with that character.

Gresham, 173 Wn.2d at 7. The instruction given in this case is legally insufficient because it did not tell the jury the limited purpose of the ER 404(b) evidence and did not inform them that it could not be used to show that the defendant acted in conformity. The State's flawed instruction, *Gresham* held that "the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction." *Gresham*, at 7. The error in this case was not harmless. Failure to give an ER 404(b) limiting instruction is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Gresham*, 173 Wn.2d at 8, citing *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Here, the error was not harmless because other than B.L.'s testimony and that of C.T. and M.J., and the medical evidence that the state confirms recent sexual intercourse, there is no physical or forensic evidence.

Therefore, it cannot be said in this case that the failure to give the required limiting instruction was harmless, because it likely did have an impact on the verdict in Count 1. Thus, this error also requires the reversal of the convictions in this case.

5. IN THE ALTERNATIVE, THIS COURT SHOULD TRANSFER

**THIS MATTER FOR AN EVIDENTIARY HEARING TO
PRESENT TESTIMONY REGARDING DURATION OF
MOTILE SPERMATOZOA AND LACK OF PHYSICAL
FINDINGS**

RAP 16.11 provides:

“If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.

As argued supra, trial counsel failed to perform an adequate pretrial investigation, including failure to retain medical testimony regarding the duration of sperm motility, and also to testify regarding the lack of physical evidence such as seminal or vaginal fluid that would be consistent with sexual intercourse. See, Motion Requesting Evidentiary Hearing, at 4-5. See, *State v. Walker*, 37 Wn.App. 628, 683, P.2d 1110 (1984). The purpose to the evidentiary hearing would be to establish medical facts including the established length of time the motile sperm would be expected to be found, the established time parameters that non-motile sperm would be expected to be detected after intercourse, and to have a consulting medical expert review the

medical records and lab results regarding the absence of trace evidence. Motion Requesting Evidentiary Hearing at 7-8. Meredith argues that the argument pertaining to his claim of ineffective assistance of counsel should be returned to the trial court for an evidentiary hearing for evaluation of the availability of expert medical testimony to rebut the argument that the presence of non-motile sperm could result from sexual activity as recently as two hours before the examination.

The defense counsel failed to investigate and provide expert scientific evidence regarding the length of time. The question of the time that motile spermatozoa would be expected to be found has direct bearing on Mr. Meredith's claim of ineffective assistance of counsel. Unless this Court the arguments contained in Sections 1, 2, 3 compelling, this Court should remand the case to the trial court for a fact-finding in order to evaluate Mr. Meredith's claim of ineffective assistance of counsel. RAP 16.12.

D. CONCLUSION

Mr. Meredith has demonstrated, in the arguments above and in his pro se PRP, Brief in Support of PRP, Supplemental Reply Brief, and Motion Requesting Evidentiary Hearing that he was deprived of his constitutional and statutory rights to effective assistance of counsel. Mr. Meredith has also

demonstrated both constitutional errors giving rise to actual prejudice and no constitutional errors that constitute a fundamental defect that inherently resulted in a complete miscarriage of justice. Mr. Meredith's restraint is unlawful under RAP 16.4, and this Court should grant him relief from restraint, for all of the foregoing reasons and conclusions, Mr. Meredith respectfully requests that this Court should either grant a new trial or remand the case to the trial court for an evidentiary hearing.

DATED: June 22, 2016.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in cursive script, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835

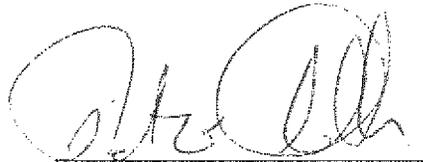
Of Attorneys for Gary Meredith

CERTIFICATE OF SERVICE

The undersigned certifies that on June 22, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the Gary Meredith and a copy was e-mailed to Thomas Roberts:

Thomas Roberts Deputy Prosecuting Attorney 930 Tacoma Ave S Rm 946 Tacoma, WA 98402-2171	Mr. David Ponzoha Clerk of the Court Court of Appeals Division II 950 Broadway, Ste. 300 Tacoma, WA 98402
Gary Meredith DOC #984777, Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520 <u>LEGAL MAIL/SPECIAL MAIL</u>	

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 22, 2016.



PETER B. TILLER

TILLER LAW OFFICE

June 22, 2016 - 4:56 PM

Transmittal Letter

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